NO. 82-1499

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

LARRY MARQUEZ,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. WHETHER APPELLANT'S NOTICE OF APPEAL WAS TIMELY FILED SO AS TO CONFER JURISDICTION ON THIS COURT.

II. WHETHER APPELLANT'S CLAIMS WERE RAISED IN THE COURT BELOW SO THAT THEY ARE PROPERLY BEFORE THIS COURT.

III. WHETHER EVIDENCE INTRODUCED AT APPELLANT'S TRIAL WAS OBTAINED BY AN ILLEGAL SEARCH AND SEIZURE.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Appellee herein, by and through its attorney, the Attorney General of Texas, and respectfully moves to dismiss the appeal or affirm the judgment of the Texas Court of Criminal Appeals denying Appellant the relief sought.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals affirming Appellant's conviction entered on September 15, 1982, is attached to the jurisdictional statement as an appendix.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(2).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein, in addition to the statutory and constitutional provisions cited by Appellant, is 28 U.S.C. §2101(d), which provides as follows:

> The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

Also involved is Rule 11 of the Rules of this Court, which provides, in pertinent part, as follows:

> .1. Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this Rule, except that in the case of appeals pursuant to 28 U.S.C. §§1252 or 1253, the time limit for docketing shall be 60 days from the filing of the notice of appeal. See 28 U.S.C. §2101(a). The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed.
>
> * * *
>
> .3. The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a

petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

STATEMENT OF THE CASE

Appellee is in substantial agreement with Appellant's statement of the case.

MOTION TO DISMISS OR AFFIRM

I. BECAUSE NOTICE OF APPEAL WAS NOT TIMELY FILED, THIS COURT LACKS JURISDICTION OVER THIS APPEAL.

Pursuant to 28 U.S.C. §2101(d) and Rule 11.1 of the Rules of this Court, Appellant was required to file notice of appeal within ninety days from the date of the judgment of the Court of Criminal Appeals. The decision of the Texas appellate court affirming Appellant's conviction was delivered September 15, 1982, and thus notice of appeal was due on or before December 13, 1982. Because notice of appeal was not filed until March 7, 1983, it was untimely in the extreme, and this Court does not have jurisdiction to entertain this appeal.

Appellant seeks to excuse his tardiness on several grounds. First, he claims that the filing of his motion for leave to file motion for rehearing in the state appellate court tolled the time for filing notice of appeal. This is incorrect. Rule 11.3 provides that the time for filing notice of appeal runs from the date of the denial of rehearing "if a petition for rehearing is timely filed . . ." Here,

however, the state appellate court denied leave to file the motion for rehearing. Because Appellant's motion for rehearing was not filed or considered on the merits, it did not extend the time for filing notice of appeal. *Bowman v. Lopereno*, 311 U.S. 262, 266 (1940); *Morse v. United States*, 270 U.S. 151, 153 (1926). Similarly, Appellant's untimely motion to vacate conviction, for which there is no provision under state procedure, did not alter this time requirement. Finally, Appellant mistakenly asserts that the time for filing notice of appeal began to run from the date the state court's mandate was issued. In fact, however, it is the date of judgment from which the relevant time period is measured. Rule 11.3 provides that "[t]he time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered and *not from the date of the issuance of the mandate* . . ." (emphasis added). *See, Market St. R. Co. v. Railroad Commission*, 324 U.S. 548, 550-52 (1945).

II. THE QUESTIONS PRESENTED BY APPELLANT WERE NOT RAISED IN THE COURTS BELOW AND THEREFORE ARE NOT PROPERLY BEFORE THIS COURT.

In his jurisdictional statement, Appellant states the questions presented to be as follows:

> (1) Whether the refusal of the Texas Court to apply the state statutory standards for "arrest," to activity of a police officer that admittedly was intended to prevent movement of the appellant for an indefinite period of time, violated the fourth amendment.
>
> (2) Whether the area on the floor and beneath the front passenger seat of a standing automobile in which this appellant was seated when the appellant was the subject of in-

> vestigation by officers is subject to a protective search for weapons under the fourth amendment.
>
> (3) Whether an object not shown by its nature to resemble either a weapon or a container for a weapon, located on the floorboard by the right front passenger seat of a standing automobile, is subject to seizure during a "frisk" or protective search under the fourth amendment.

In his brief to the Texas Court of Criminal Appeals, Appellant raised the following issues regarding the search and seizure:

> (1) The trial court erred in admitting evidence produced as the result of a warrantless search, because there was insufficient evidence of specific and articulable circumstances to justify the investigatory stop of the defendant.
>
> (2) The trial court erred in admitting evidence produced as the result of a warrantless search, because the prosecution failed to show exigent circumstances that made a search without a warrant imperative.

The cases are legion that this Court cannot decide issues raised for the first time on petition for writ of certiorari or on appeal and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long standing nature of the rule: "[I]n *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*,5 Cranch 344 (1809), and came to the conclusion

that the Judiciary Act of 1789, 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear in the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale v. Louisiana, supra*, at 439.

Appellee submits that in view of Appellant's failure to raise the issues presented here below, the failure of the state court to pass on these issues, the desirability of giving the state the first opportunity to address the issues, and the fact that a federal habeas remedy may remain if no state procedure for raising the issues is available to Appellant, the appeal should be denied for want of jurisdiction. *Cardinale v. Louisiana, supra*, at 439.

III. APPELLANT'S FOURTH AMENDMENT CLAIMS ARE UNWORTHY OF THIS COURT'S ATTENTION.

In rejecting Appellant's Fourth Amendment claims on direct appeal, the Texas appellate court held that "[t]he initial investigatory stop was justified under the circumstances of this case" and that the officer's fear that Appellant possessed a weapon constituted exigent circumstances due to which he "was not required to obtain a warrant . . ." Appellant has advanced no pertinent reasons why these holdings should be overturned. Moreover, these are factual issues which are insufficient to justify the exercise of this Court's jurisdiction. *Tacon v. Arizona*, 410 U.S. at 352; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

For the reasons stated, this appeal should either be dismissed or affirmed.

Respectfully submitted,

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